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FOR ARGUMENT.

IN THE

Supreme Court of the United States

OCTOBER TERM, 1977

No. 77-747

WALTER J. FLECK, ET AL.,

Appellants,

vs.

WARREN SPANNAUS, ET AL.,

Appellees.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MINNESOTA

REPLY BRIEF OF APPELLANT ALLIED STRUCTURAL STEEL COMPANY

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ARGUMENT

We respectfully suggest that the case has narrowed down to a rather simple issue as the following analysis shows:

Minnesota does not deny that its Pension Act drastically impaired the obligations of Allied's pension contracts.

Employer payments into a pension trust are a form of compensation. Thus, the Minnesota Act is no less than a retroactive wage increase for employees who had been paid in direct cash or fringe benefits everything they were entitled to.

Moreover, Allied's unrestricted contractual right to terminate the Plan at any time and to require the trustee to liquidate

the Trust was changed to one that permitted Allied to terminate it only if it paid a "pension funding charge" the amount of which was determined by the difference between what the Plan required and what was required on the 10 year vesting provision that Minnesota created.

Therefore, it is apparent that the case presents a genuine question of impairment going to the substance of important financial contracts—unlike *Home Building & Loan Ass'n.* v. *Blaisdell,* 290 U. S. 398 (1934), where the substance of the contract remained untouched but the enforcement process was altered.

We thus come to what we see as the turning point of this appeal—was the statute passed to meet a "vital" public need (*Blaisdell,* 290 U. S. at 434), a "vital interest" (*East New York Savings Bank* v. *Hahn,* 326 U. S. 230, 232), an "important" one (*El Paso* v. *Simmons,* 379 U. S. 497, 517; *United States Trust,* 431 U. S. at 21, 25, 29) or was it a temporary stopgap law to meet a parochial problem?

Minnesota seeks to avoid this hard question by erroneously asserting that Allied does not seriously dispute that the Act is directed to valid public purposes and by saying the statute "serves a legitimate" or "valid" public purpose (Minnesota Brief at 12). This dilution of the requirement that a problem, if it is to warrant contract disruption, be urgent fails for two reasons:

1. It is legally wrong—the Court never has held that *any* legitimate public purpose will suffice—it must be a "vital" or "important" one.

2. As we demonstrate below, the statute served no general, but a mere parochial purpose.

Minnesota's brief tacitly concedes (p. 12) that only a "small percentage" of its population benefited directly from the Act, but inconsistently charges (p. 12) that Allied cannot cite any

evidence in the record supporting its implication that only a small number benefit. The charge is incorrect. The brief writers overlook that on February 11, 1975, appellee Phyllis Spielman, Administrator of Minnesota's Pension Protection Division, made affidavit, originally filed in the Northern District of Illinois, that "potentially 15[1] Minnesota employees of Allied Structural Steel Company [were] covered by the Act * * * approximately 1500[2] terminated Minnesota employees of the White Motor Corporation and approximately 30 Minnesota employees of Thermotech Plastics Division of International Telephone and Telegraph." Spielman affidavit, ¶ 13, Appendix B at 4b *infra.* We travel outside the record to affirm that we are reliably informed (and will accept correction by Minnesota if we are wrong), that the reference to the 30 Thermotech Plastics Division employees was erroneous. In that enterprise only a particular division was closed; its employees and their pension rights were transferred to another installation of the employer, International Telephone and Telegraph, so that the Act did not apply to them. Thus, only 1281 employees out of a Minnesota population of approximately 3,934,000, with 1268 of them employed by one employer, were potentially or contingently involved. We say contingently because it is a statistical certainty that not all of the 1281 will live to attain normal retirement age of 65 and entitlement to a pension. Permit us to guess that about 900 will survive.

Minnesota seeks to bolster its public purpose argument by asserting that there are thousands of Minnesota taxpayers who would benefit from savings in state health and welfare costs which might arise from the inadequacy of private pension funds. This argument is without real substance, for supplementary in-

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1. Ms. Spielman was not quite correct—13 Allied employees are involved. Joint Appendix at A50.

2. Subsequent investigation revealed the actual number was 1268. *Malone* v. *White Motor Corporation,* No. 76-1184, decided April 3, 1978, at footnote 5.

comes or assistance for retired industrial employees are provided by the federal Social Security and Medicare programs. While Minnesota does have peripheral programs that affect all persons 65 or older, such as free bus fares, reduced real estate taxes, and the like, few of these are keyed to want or necessity, and, in any event, the amounts of Minnesota public funds involved for about 900 survivors would be inconsequential. Certainly there is no evidence in the record as to these hypothetical benefits to Minnesota taxpayers.

The fact is that there was no vital necessity for this law. In contrast is the situation when Minnesota passed its Mortgage Moratorium Law in 1933 which was held constitutional in *Blaisdell*. There, the legislature made a declaration of emergency and elaborate findings of the then disastrous state of affairs. These recitals were carried into this Court's opinion (290 U. S. at 417). Thus, in 1933 the Minnesota legislature recognized that, even though the cruel facts of the Depression were known to everyone, there had to be a vital public necessity for it to alter even the enforcement provisions of mortgage contracts. It told what that vital necessity was. But the 1974 legislature, apparently determined to go ahead with its Pension Act, found itself unable to make a declaration or findings akin to those which had been made in 1933. Nor were there the exhaustive legislative hearings and studies which the New York legislature engaged in before passing its Mortgage Moratorium Law and which were relied on by this Court in deciding *East New York Savings Bank* v. *Hahn*, 326 U. S. 230 (1945).

Minnesota decries our reference to a similar pension vesting act adopted in New Jersey and held unconstitutional by the New Jersey courts. *Raybestos-Manhattan, Inc.* v. *Glaser*, 144 N. J. Super. 152, 356 A. 2d 1 (1976) *aff'd.* ..... A. 2d ..... (Copy attached as Appendix A at 1a, *infra*.) Although Minnesota points out cosmetic differences between its Act and that of New Jersey, the real difference between the two situations appears to be that Minnesota affected approximately 1281 em-

ployees, $10,150,000,[3] and two employers while New Jersey reached approximately 880 employees, $13,474,357 and one employer.

Turning to Minnesota's cases. Minnesota treats due process cases arising under the 5th Amendment, as to the federal government, and the 14th, as to state governments, as being the equivalent of contract impairment cases arising under Article I. It is true that many of the considerations involving due process cases are close to those involving contract clause cases, but the Court has never held that the prohibitions are identical.

On the contrary, in cases in which federal action has been attacked both as impairing the obligations of contracts and as a taking of property without due process, the Court repeatedly has held that the prohibition against impairment of contracts does not apply to the federal government. It would have been unnecessary to make this distinction if the Court believed that the tests of constitutional validity were the same under the contracts concept as under due process. The Court never has treated the due process clauses and the Contracts Clause as identical. *See, e.g., Legal Tender Cases*, 12 Wall. (79 U. S.) 457 (1870); *Sinking Fund Cases*, 99 U. S. 718 (1878); *Mitchell* v. *Clark*, 110 U. S. 643 (1884); *New York* v. *United States*, 257 U. S. 591 (1922); *Continental Illinois Nat. Bank & Trust Co. of Chicago* v. *Chicago, R. I. & P. Ry. Co.*, 294 U. S. 648 (1935). Lower federal courts that have decided the question agree that the Contracts Clause is not incorporated in the due process clause of the Fourteenth Amendment. *See, Spears* v. *Mount Etna Morris*, 313 F. Supp. 52 (W. D. Mo. 1969), *aff'd.* 431 F. 2d 1089 (1970); *Pudlik* v. *Public Service Company of Colorado*, 166 F. Supp. 921, 925 (D. Colo. 1958).

The prohibition against state impairment of contracts is definite, although the Court has held that it must yield to the

3. Approximately $10,000,000 beyond what White Motor had guaranteed plus approximately $150,000 placed on appellant.

exercise of state sovereignty in cases where vital interests of state sovereignty are concerned. *United States Trust*, 431 U. S. at 21.

The due process clauses are neither definite nor readily defined. Due process, we submit, is a more amorphous and relaxed limitation on state and federal power than the Contracts Clause is upon the exercise of state power. This is shown by the cases just cited and by an examination of the cases Minnesota cites. Thus, *Stephenson* v. *Binford*, 287 U. S. 251, 272 (1932), cited by Minnesota, involved state regulation of contract motor carriers and regulation of state highways. Both matters affected wide public interests. *Usery* v. *Turner Elkhorn Mining Company*, 428 U. S. 1 (1976), involved the question of federal substantive due process in imposing workman's compensation type liability upon mine operators for the benefit of miners who antecedently had contracted black lung disease. Finally, at its page 24, Minnesota cites cases involving regulated businesses such as public utilities in which historically it has been recognized that states or the federal government can regulate rates and other conditions of the business regardless of private contracts. Such cases are inapposite here.

The line, however thin, between violation of due process and impairment of contracts is important. Some day ERISA, which contains elements of retroactivity, although far milder than here, may be before the Court. That case, if there be one, can await its own study and analysis. But, if it comes, that case will not involve the Contracts Clause inhibiting state action.

Paraphrasing and changing the tense from United States Trust at page 16, "The Contract Clause is not without meaning in modern constitutional jurisprudence and its limitation on state power is not illusory."

CONCLUSION

The brief *amicus* of the Chamber of Commerce has ably pointed out the importance of the stability of contracts to the carrying on of commerce throughout the 50 states. It is respectfully prayed that the Court reverse the judgment of the district court and direct it to enjoin enforcement of the Act.

Respectfully submitted,

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April 19, 1978.

APPENDICES

APPENDIX A

SUPERIOR COURT OF NEW JERSEY
Appellate Division

RAYBESTOS-MANHATTAN, INC., a corporation of the State of New Jersey,
Plaintiff-Respondent,

v.

SIDNEY GLASER, et al.,
Defendants-Appellants

and

JOHN LEOGRANDE, et al.,
Intervening Defendants-Appellants.

A-608-76
A-690-76

Argued January 4, 1978 — Decided March 1, 1978

Before Judges LOMM, SEIDMAN, and MILMED.

Per Curiam.

We affirm substantially for the reasons expressed in the comprehensive opinion of Judge Lenox reported at 144 *N. J. Super.* 152 (Ch. Div. 1976).

Additionally, we question whether the Legislature, in the guise of taxation, may take from an employer made subject thereto by the statute an amount equal to "the total amount of nonvested pension benefits of such employees of the employer who have completed 15 years of covered service • • • and whose nonvested pension benefits have been or will be forfeited because of such termination of employment • • •," and then cause the moneys to be distributed to each eligible employee making claim thereto, in the amount of the current value of the benefits to which each would be entitled.

While the Private Nonvested Pension Benefits Protection Tax Act, P. L. 1973, c. 124 (the "Act") does not by its terms specifically establish a "dedicated fund" in the sense that the monies collected under the Act are required to be held separate and apart from the general revenues of the State and dedicated to a specific purpose, it is obvious that the Legislature intended the monies collected from an employer to be used to pay the "nonvested pension benefits" to his employees. This intention is evidenced by Section 8 of the Act which provides that each such employee shall be entitled to make a claim for an immediate payment of the current value of his nonvested pension benefits or a deferred pension benefit and to receive such payment or benefit in accordance with the rules and regulations promulgated by the Commission of Labor and Industry.

Under the Act the tax is "equal to the total amount of nonvested pension benefits" which employees will lose upon the closing of their employer's place of business (Sec. 3).

The Statement accompanying the Senate Committee's version of the bill says:

> The revenues collected from the tax would be paid to employees to the extent of their nonvested pension rights in accordance with rules and regulations promulgated by the Commissioner of Labor and Industry.

In view of the foregoing, it appears there is merit to respondent's assertion that the intent of the Act is to require the employer to provide for each employee exactly what he would have received if he had qualified for a pension under the terms of the employer's pension plan, and that the role of the State is simply that of a fiscal intermediary.

Respondent's argument that the Act which expired on July 1, 1975, is not a tax in that it does not raise money for general revenue purposes or a public purpose, its sole purpose being to provide specific employees with funds equivalent to their nonvested pension benefits with the Director of Taxation serving merely as a conduit of monies secured from the respondent

employer for the individual benefit of its employees, is persuasive. 71 *Am. Jur.* 2d "Taxation," § 3, p. 345, § 44, pp. 373-374, § 48, p. 375. *United States* v. *Butler*, 297 U. S. 1, 61, 30 L. Ed. 477, 485 (1936); *The Tide-water Co.* v. *Coster*, 18 N. J. Eq. 518, 523 (E. & A. 1866); *Roe* v. *Kervick*, 42 N. J. 191, 207 (1964).

Carmichael v. *Southern Coal & Coke Co.*, 301 U. S. 495, 81 L. Ed. 1245 (1937), in which the validity of a tax assessed against employers to subsidize an unemployment compensation fund was upheld, and cited by the intervenors in support of their position that the Act is a tax with a public purpose analogous to the Unemployment Compensation Law, is distinguishable.

Moreover, as pointed out in respondent's brief, the monies here involved are exacted and appropriated in one step, with the result that the revenues derived therefrom never become available for the support of the government. Unlike the Unemployment Compensation Law, *N. J. S. A.* 43:21-1, *et seq.*, under which an employer's contributions go into a fund used to provide benefits for all qualifying persons in the State, the monies here sought to be obtained from the respondent employer will be paid over to its former employees alone thereby imbuing the Act with the attributes of an act private in nature. *The Tide-water Co.* v. *Coster*, *supra*.

We also note in passing, although we deem it unnecessary to decide the issue, some reservation as to the Act's constituting a legitimate exercise of the police power in light of respondent's contention that the tax cannot be sustained on that theory because "having been imposed for the benefit of a narrowly constricted class of individuals and having at most a merely incidental or collateral effect on the public welfare, it fails to meet the stringent public purpose test applicable to exercise of the police power."

Affirmed.

APPENDIX B

IN THE UNITED STATES DISTRICT COURT
for the Northern District of Illinois
Eastern Division

WALTER J. FLECK, et al.,
Plaintiffs,
vs.
WARREN SPANNAUS, et al.,
Defendants.
No. 74 C 3532

STATE OF MINNESOTA } ss
COUNTY OF RAMSEY }

AFFIDAVIT OF PHYLLIS SPIELMAN

Phyllis Spielman, being first duly sworn upon oath, deposes and says:

1. That your affiant is named as a defendant in the above-entitled case and that she is the Administrator of the Pension Protection Division of the Department of Labor and Industry, State of Minnesota (hereinafter the "Pension Division"). This affidavit is submitted in support of the Minnesota defendants' motion for transfer of the above-entitled case to the district of Minnesota, pursuant to 28 U. S. C. A. § 1404(a).

2. That the State of Minnesota's investigative responsibilities under Minn. Stat. ch. 181B (1974) (hereinafter the "Minnesota Pension Act") require the services of certified public accountants and actuaries which must be obtained by way of a consultant contract with an independent accounting and actuarial firm. The State does not have available full-time personnel

with the required expertise to provide the Pension Division with such services.

3. That the initial step in obtaining a consultant contract is to petition to the Legislative Advisory Committee, State of Minnesota, for a transfer of funds from the State's General Contingent Fund to the appropriate State agency. On May 23, 1974, the Pension Division requested the Legislative Advisory Committee to transfer funds in the amount of $10,000 for accounting and actuarial services. That request was approved on June 26, 1974.

4. That, in accordance with State procedures, the Pension Division then sent letters to numerous accounting and actuarial firms indicating the intent of the Pension Division to negotiate a consultant contract and requesting the firms' responses.

5. That subsequently a contract was negotiated with the accounting firm of Segal, Sudit, Rochlin and Lurie, 400 Shelard Plaza South, Minneapolis, Minnesota (hereinafter the "Minneapolis firm"). That contract was executed on September 9, 1974.

6. That following approval of the contract by the State's Departments of Administration and of Finance, a Request for Encumbrance of Funds was issued to the Department of Administration on October 2, 1974. That request was approved on October 8, 1974, in the amount of $10,000, thus enabling the Pension Division to issue payments on its consultant contract with the Minneapolis firm.

7. That the time-consuming legislative and administrative steps in obtaining the consultant contract with the Minneapolis firm outlined above must be followed any time the Pension Division wishes to obtain the services of a consultant.

8. That the Minneapolis firm's duties under the consultant contract include: (a) becoming familiar with the pension plans involved; and (b) determining the number of employees whose vested and non-vested pension benefits under the pension plan are covered by the Minnesota Pension Act, the amounts of such

vested and non-vested pension benefits in accordance with the provisions of the pension plan, and the pension funding charge liability of an employer under the Minnesota Pension Act. These duties have been heretofore carried out primarily by Byron Frank and Joseph Yablonski, certified public accountants associated with the Minneapolis firm.

9. That under the terms of the consultant contract, the Minneapolis firm is expected to obtain actuarial assistance, if need be, in making their determinations. The Minneapolis firm's total compensation and expenses, including the cost of an actuarial assistance, relative to all pension plans affected by the Minnesota Pension Act may not exceed the $100,000 allocated to the Pension Division.

10. That the determinations by the Minneapolis firm necessitate an in-depth study of a given employer's pension plan and trust fund account for that plan, the review of employee records and accumulation of employee information, an application of actuarial assumptions and expertise, and an acquisition of a working knowledge of the terminology and procedures set forth in the Minnesota Pension Act.

11. That should the above-entitled case proceed to trial, the Minnesota defendants intend to call at least Mr. Frank and Mr. Yablonski as witnesses to testify to the plaintiff Allied Structural Steel Company's funding charge liabilities and the methods utilized in determining the amounts of the charge.

12. That the State's funding of the consultant contract with the Minneapolis firm does not contain sufficient funds to pay the expenses of having members of that firm testify in Chicago should the case remain venued there. To encumber additional funds to pay the expenses of their testifying in Chicago or to obtain a similar accounting and actuarial firm in Chicago would necessitate an additional contract subject to the legislative and administrative steps outlined above. Because of the time involved and the potential unavailability of funds, the Minnesota defendants could not be assured of obtaining a consultant as

qualified as the Minneapolis firm for purposes of trial. That, in any event, securing an additional accounting and actuarial consultant firm located in Chicago would result in a duplication of the many hours spent by the Minneapolis firm.

13. That, as presently known by the Pension Division and unless the Minnesota Pension Act is otherwise judicially construed, not only are there potentially 15 Minnesota employees of Allied Structural Steel Company covered by the act, but also the act presently covers approximately 1,500 terminated Minnesota employees of the White Motor Corporation and approximately 30 Minnesota employees of the Thermotech Plastics Division of International Telephone and Telegraph.

14. That by letter dated August 7, 1974, plaintiff Allied Structural Steel Company gave notice to the Pension Division of its intent to terminate the operation of its division in Minnesota and of its previous termination of Minnesota employees. Said letter of notification was not received by the Pension Division until September 11, 1974. A true and correct copy of Allied Structural Steel Company's August 7, 1974, notification letter is attached hereto as Exhibit "A." A true and correct copy of the September 11, 1974, letter transmitting the notification letter to the Pension Division is attached hereto as Exhibit "B."

15. That to date the Pension Division, through the Commissioner of Labor and Industry, neither has certified a pension funding charge to plaintiff Allied Structural Steel Company nor has authorized the commencement of an action to recover a pension funding charge from plaintiff Allied Structural Steel Company.

Further your affiant sayeth not.

Dated: February 11, 1975.

/s/ PHYLLIS SPIELMAN
Phyllis Spielman

[Jurat omitted in printing.]